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I

By the end of the nineteenth century two tests had developed in the criminal law of England and America to determine whether an offender should be held criminally liable. The first of these, the so-called *M'Naghten* rule, predicated responsibility on the offender's ability to distinguish right and wrong, good from evil. The second test, often called the "irresistible impulse" or "controlling impulses" test, relieved the offender from criminal sanctions if his actions were caused by some compelling force which he could not control.

During most of the nineteenth century, the District of Columbia courts vacillated between the two tests. In 1818, a District of Columbia court instructed a jury that if it found that the defendant was in "such a state of mental insanity . . . as not to have been conscious of the moral turpitude of the act," it should not find him guilty.[1] In 1853, however, at least one judge demonstrated that he was not opposed to the controlling impulse concept by instructing the jury that:

> In order to constitute a crime a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if through the overwhelming violence of mental disease his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.[2]

But only a few sentences later in the same charge to the jury the judge elaborated on criminal responsibility in the context of the right-wrong test. Several years later, another court gave the instruction in a murder trial that if the defendant was "laboring under some controlling disease, which was in truth the acting power within him which he could not resist," he should be acquitted.[3]

Nevertheless, after *United States v. Guiteau*[4] in 1882 there was no doubt that the *M'Naghten* right-wrong test was applicable in the Dis-

1. United States v. Clarke, 2 D.C. (2 Cranch) 158 (1818).
2. United States v. Woodward, 7 D.C. (2 Haz. & Hay.) 119, 120 (1853).
3. United States v. Sickles, 7 D.C. (2 Haz. & Hay.) 319, 328 (1859).
4. 12 D.C. (1 Mackey) 498 (1882).

trict of Columbia, although the status of the controlling impulse test remained uncertain. The trial was an excellent forum for pronouncing an insanity standard, since the defendant was the assassin of President Garfield. Guiteau, who believed that he had to murder the President to save the Republican Party and the country, relied heavily on the theory that he suffered insane delusions at the time of the crime. The trial judge instructed the jury that:

> If he [Guiteau] is laboring under disease of his mental faculties—if that is a proper expression—to such an extent that he does not know what he is doing, or does not know that it is wrong, then he is wanting in that sound memory and discretion which makes a part of the definition of murder.[5]

Guiteau's defense counsel had requested an instruction on controlling impulse,[6] but the trial judge refused. The appellate court held that the refusal had been proper, but only because no evidence had been introduced on controlling impulse. The higher court specified that it was not ruling on whether the defense counsel's requested wording reflected the law of the District of Columbia.[7]

Shortly after the *Guiteau* decision, the right-wrong test came under severe attack. Much of the debate centered on the issue of whether "knowing" wrong should be limited to cognition. An 1895 decision went beyond a merely literal definition of "knowing":

> Does the evidence prove or does it leave your minds in reasonable doubt upon the question whether the defendant knew or *responsibly appreciated* that it was wrong to kill a human being?[8]

Arguments were raised that the right-wrong test—whatever the definition of "knowledge"—dealt only with cognitive or intellectual impairments and failed to recognize personality as an integrated whole. Finally, in 1929, the Court of Appeals decided in *Smith v. United States*[9] that the irresistible impulse test also applied in the jurisdiction. The court announced:

> The mere ability to distinguish right from wrong is no longer the correct test either in civil or criminal cases, where the defense of insanity

5. *Id.* at 550.
6. *Id.*
7. *Id.*
8. Travers v. United States, 6 App. D.C. 450, 464 (1895) (emphasis added).
9. 36 F.2d 548 (D.C. Cir. 1929). All references to "Court of Appeals" indicate the United States Court of Appeals, District of Columbia Circuit. This court is to be distinguished from the District of Columbia Court of Appeals (formerly Municipal Court of Appeals).

> is interposed. The accepted rule in this day and age . . . is that the accused must be capable, not only of distinguishing between right and wrong, but that he was not impelled to do the act by an irresistible impulse, which means before it will justify a verdict of acquittal that his reasoning powers were so far dethroned by his diseased mental condition as to deprive him of the will power to resist the insane impulse to perpetuate the deed, though knowing it to be wrong.[10]

The holding in *Smith* allowed trial judges to instruct juries in terms of either a right-wrong test or at least some form of irresistible impulse. Perhaps the *Smith* court was concerned only with literally impulsive, spur-of-the-moment conduct, but such a limitation, if it ever existed, was removed by the Court of Appeals in 1945 when it remarked that a defendant is insane ". . . if his reason has ceased to have dominion of his mind to such an extent that his will was controlled, not by rational thought, but by mental disease."[11] Such language apparently allowed an insanity defense for an act compelled by the disease, although not impulsive. A later case implied that *Guiteau*, *Smith*, and the language just quoted represented three different tests, all applicable to trials in the District of Columbia in which the insanity defense was raised.[12]

Once an insanity defense was defined and established, the question still remained whether it was the defendant or the state who had to bear the burden of proof. As early as 1859 the District of Columbia Circuit Court discussed this problem, stating that the insanity issue was similar to any other question of fact in a criminal trial:

> When evidence is adduced that a prisoner is insane, and conflicting testimony makes a question for the jury, they are to decide it like any other matter of fact; and if they should say or conclude that there is uncertainty, that they cannot determine whether the defendant was or is not so insane, as to protect him, how can they render a verdict that a sane man perpetrated the crime and that no other can?[13]

Although the ultimate burden rested on the state to prove defendant's sanity beyond a reasonable doubt, the defendant bore the initial burden of producing evidence to show that he was insane. This result arose from the age-old presumption of sanity in the criminal law. Con-

10. *Id.* at 549.
11. Halloway v. United States, 148 F.2d 665, 666 (D.C. Cir. 1945).
12. Douglas v. United States, 239 F.2d 52, 58 (D.C. Cir. 1956).
13. United States v. Sickles, 7 D.C. (2 Haz. & Hay.) 319, 327 (1859) (emphasis added).

ceivably, a defendant could introduce evidence on the insanity issue which was so insubstantial that it failed to meet his initial burden. In *Tatum v. United States*,[14] however, the District of Columbia Court of Appeals ruled that any evidence of insanity presented by the defendant shifted the burden to the Government. Moreover, it was for the jury to decide if the defendant's evidence raised a reasonable doubt of insanity. Thus, if some evidence of insanity was introduced, the appropriate instruction should be given to the jury for it to decide if the evidence required acquittal.[15] The judge's role was merely to determine if the issue of insanity had been raised at all.

By 1954, the District of Columbia had an insanity defense clearly based on a combination of the *M'Naghten* right-wrong test and the irresistible impulse test. The court had also explicitly defined the burden of proof question in relation to the insanity defense. Still, criticism of the insanity tests continued and alternatives were suggested. In 1954, the Court of Appeals for the District of Columbia undertook a re-evaluation of the entire body of law surrounding the insanity defense. As a result of this evaluation, a new formulation of the insanity defense was created.

II

The new insanity rule was announced in *Durham v. United States*.[16] The defendant, Monte Durham, was convicted in the district court on a charge of house-breaking, his only defense being insanity. On appeal, two grounds for reversal were urged: The trial court erred in applying the rules governing the burden of proof on the insanity defense; and the existing tests of criminal responsibility were obsolete and should be superseded.

Judge Bazelon, writing for the court, first considered the lower court's application of existing law. The trial judge had held that since the defendant introduced no evidence of insanity, the presumption of sanity decided the issue against him. Judge Bazelon found that the defendant's mother had recounted her son's nervous condition, and more importantly, the only expert witnesss, a psychiatrist, had testified that defendant *could* have been suffering from mental illness at the time of the offense, although he was not positive. Relying chiefly on *Ta-*

14. 190 F.2d 612 (D.C. Cir. 1951).
15. Douglas v. United States, 239 F.2d 52, 55 (D.C. Cir. 1956).
16. 214 F.2d 862 (D.C. Cir. 1954).

tum, Judge Bazelon held that the evidence offered by the defendant was sufficient to have placed the burden on the Government to prove his sanity. Since the trial judge misapprehended the proper placing of the burden of proof, the conviction was overturned.[17]

Nevertheless, the court did not rest its decision on the first error alone. Judge Bazelon went on to consider the existing tests for insanity in the District of Columbia. He first pointed out the many criticisms of the right-wrong test raised since its adoption by the majority of American courts. The Report of the Royal Commission on Capital Punishment 1949-1953 and the Preliminary Report by the Committee on Forensic Psychiatry had concluded that the right-wrong test was "based on an entirely obsolete and misleading conception of the nature of insanity."[18] By using the right-wrong test, the court and jury were forced to look at only the cognitive element in the human personality, which is "scientifically speaking, inadequate, and most often, invalid and irrelevant testimony in determining criminal responsibility."[19] Judge Bazelon argued, however, that the most fundamental objection to the right-wrong test was not so much that it forced the jury to look at the cognitive element alone, but that it forced them to look at any one particular element or symptom of human personality. "In this field of law as in others, the fact finder should be free to consider all information advanced by relevant scientific disciplines."[20] Moreover, the adoption of the "irresistible impulse" test did little to broaden the inquiry into a defendant's mental state. Unfortunately, this test carried the implication that mental disease produces "only sudden, momentary or spontaneous inclinations to commit unlawful acts."[21] As the Royal Commission Report pointed out, insane behavior is not necessarily impulsive. Such long term illnesses as melancholia or paranoia can so grip an individual that he is forced to commit irrational or criminal acts.

In concluding his review of the arguments against the right-wrong and irresistible impulse tests, Judge Bazelon summarized the main points as follows:

> We find that as an exclusive criterion the right-wrong test is inadequate in that (a) it does not take sufficient account of psychic realities and

17. *Id.* at 869.
18. *Id.* at 871.
19. *Id.* at 872.
20. *Id.*
21. *Id.* at 873.

> scientific knowledge, and (b) it is based upon one symptom and so cannot validly be applied in all circumstances. We find that the "irresistible impulse" test is also inadequate in that it gives no recognition to mental illness characterized by brooding and reflection and so relegates acts caused by such illness to the application of the inadequate right-wrong test. We conclude that a broader test should be adopted.[22]

The new test to be applied in the District of Columbia was that an "accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."[23] The word "disease" was defined in the sense of a "condition which is capable of either improving or deteriorating";[24] "defect" as a "condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease."[25] "Product," although left largely undefined, was expected to convey a sense of causal connection.[26]

In order to aid courts in future cases, Judge Bazelon attempted to give a sample instruction to the jury:

> If you the jury believe beyond a reasonable doubt that the accused was not suffering from a diseased or defective mental condition at the time he committed the criminal act charged, you may find him guilty. If you believe he was suffering from a diseased or defective mental condition when he committed the act, but believe beyond a reasonable doubt that the act was not the product of such mental abnormality, you may find him guilty. Unless you believe beyond a reasonable doubt either that he was not suffering from a diseased or defective mental condition, or that the act was not the product of such abnormality, you must find the accused not guilty by reason of insanity. Thus your task would not be completed upon finding, if you did find, that the accused suffered from a mental disease or defect. He would still be responsible for his unlawful act if there was no causal connection between such mental abnormality and the act. These questions must be determined by you from the facts which you find to be fairly deducible from the testimony and the evidence in this case.[27]

Concluding his opinion, Judge Bazelon explored the benefits which the new rule might be expected to produce. The psychiatrists would

22. *Id.* at 874.
23. *Id.* at 875.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*

hopefully be enabled to give a complete picture of the defendant for the jury to evaluate. Moreover, on the ultimate factual issue of insanity, the jury would not be limited to a consideration of isolated symptoms or elements of the defendant's personality, but could explore all relevant evidence. Judge Bazelon conceded that the questions of fact under the *Durham* rule might be difficult for the jury, but he felt that these questions should be no more difficult than the medical questions involved in total disability claims under insurance policies. Finally, Judge Bazelon believed that under the new insanity rule, the jury would continue to perform its traditional function, the application of "our inherited ideas of moral responsibility to individuals prosecuted for crime."[28] Under the new rule, however, "they will be guided by wider horizons of knowledge concerning mental life."[29]

III

It is hardly surprising, considering the novelty of the *Durham* insanity rule, that many cases following the Court of Appeals decision in 1954 were involved in explaining and interpreting the rule. The early cases after *Durham* fall into three basic patterns: 1) those dealing with key definitions in the rule such as "mental disease" and "mental defect"; 2) those dealing with the burden of proof and the attendant problem of the role of expert testimony; and 3) those dealing with procedural matters surrounding the rule.

The Court of Appeals was faced very early with the problem of determining what constituted a "mental disease." In *Stewart v. United States*[30] at least some of the psychiatric testimony concluded that the defendant was suffering from a "psychopathic personality." This condition was not considered to be serious enough to justify its inclusion in the categories of psychoses or neuroses. In instructing the jury, the trial judge emphasized that a psychopathic personality was usually considered a "disorder," and as such would not usually be defined as a "disease," which implies some sort of physiological condition. The Court of Appeals reversed the defendant's conviction. It held that the trial judge had misconstrued the insanity rule. It is for the jury to decide whether a psychopathic disorder constituted a "mental disease" within the meaning of the *Durham* rule. In subsequent cases, the

28. *Id.* at 876.
29. *Id.*
30. 214 F.2d 879 (D.C. Cir. 1954).

court reviewed criminal convictions involving sociopaths,[31] pyromaniacs,[32] epileptics,[33] and mental retardates.[34] The court held consistently that these disorders constituted "some evidence" of mental illness, and as such were sufficient to raise a jury question whether the particular disorder came under the *Durham* rule as a "mental disease" or "defect."

Still another vexing problem for the District of Columbia courts was the meaning of "product." Trial courts had experienced some difficulty in instructing the jury that in order to find a defendant not guilty, his act must be the "product" of a mental disease or defect. In *Carter v. United States*,[35] the Court of Appeals attempted to clarify the "product" concept:

> When we say the defense of insanity requires that the act be a "product of" a disease, we do not mean that it must be a direct emission, or a proximate creation, or an immediate issue of the disease . . . we mean that the facts on the record are such that the trier of the facts is enabled to draw a reasonable inference that the accused would not have committed the act he did commit if he had not been diseased as he was. There must be a relationship between the disease and the act, and that relationship, whatever it may be in degree, must be, as we have already said, critical in its effect in respect to the act. By "critical" we mean decisive, determinative, causal; we mean to convey the idea inherent in the phrases "because of", "except for", "without which", "but for", "effect of", "result of", "causative factor"; the disease made the effective or decisive difference between doing and not doing the act. The short phrases "product of" and "causal connection" are not intended to be precise, as though they were chemical formulae. They mean that the facts concerning the disease and the facts concerning the act are such as to justify reasonably the conclusion that "but for this disease the act would not have been committed."[36]

In addition to definitional problems connected with the *Durham* rule, the court also sought to explain the role of expert testimony and its effect on the burden of proof in the insanity issue. The court was consistently liberal in accepting psychiatric testimony of character disorders as constituting "some evidence" of mental disease or defect

31. United States v. Blocker, 274 F.2d 572 (D.C. Cir. 1959).
32. Briscoe v. United States, 248 F.2d 640 (D.C. Cir. 1957).
33. Wright v. United States, 250 F.2d 4 (D.C. Cir. 1957).
34. Briscoe v. United States, 248 F.2d 640 (D.C. Cir. 1957).
35. 252 F.2d 608 (D.C. Cir. 1957).
36. *Id.* at 617.

sufficient to raise a jury question and place the burden of proof on the Government to prove defendant's sanity at the time of the crime. A more acute problem confronted the Court of Appeals in a series of cases in which the defendant contended that he should have been granted a directed verdict on the basis of expert testimony.

In *Douglas v. United States*,[37] a robbery case, both lay and expert witnesses testified to defendant's bizarre and violent personality history. Psychiatrists testified that defendant was a paranoid schizophrenic, and one stated, in response to the question of whether defendant's acts were a product of his disease, that ". . . from the symptoms present I would think there was a very definite causal relation."[38] The Court of Appeals reversed a finding of guilty by the trial court, stating that a directed verdict of not guilty by reason of insanity should have been entered because, with the testimony of the psychiatrists, reasonable doubt existed as to defendant's sanity. The prosecution, by utilizing only lay testimony on its behalf, did not meet its burden of proof. A similar case was *Blunt v. United States*,[39] another robbery case. Two psychiatrists testified that defendant had been suffering from dementia praecox on the date of the robbery, and a third said the defendant was definitely psychotic but could offer no opinion as to the duration of the mental illness. The Government offered only the testimony of the victims that the defendant appeared rational and lucid to them. Again, the Court of Appeals overturned the conviction, stating that the Government had not met its burden of proof.

Although not consistently uniform,[40] the Court of Appeals showed a strong tendency to require directed verdicts in those cases where expert witnesses had testified that defendant was suffering from a mental disease. In *Wright v. United States*,[41] eleven psychiatrists testified that the defendant was a schizophrenic. Five of them stated that at the time of the offense (murder) he was suffering from this condition. Four of the psychiatrists testified, with varying degrees of positiveness, that defendant's acts were caused by his mental condition. The only government evidence was testimony by the arresting officers. In overturning a conviction of guilty, the Court of Appeals said: "To send

37. 239 F.2d 52 (D.C. Cir. 1956).
38. *Id.* at 56.
39. 244 F.2d 355 (D.C. Cir. 1957).
40. *See, e.g.*, Bradley v. United States, 249 F.2d 922 (D.C. Cir. 1957).
41. 250 F.2d 4 (D.C. Cir. 1957).

the case to the jury in face of so strong a showing of insanity requires more than minimal evidence of sanity."[42]

Even though the court seemed to be relying heavily on psychiatric testimony in the cases immediately following *Durham*, they were not entirely satisfied with the performance of psychiatrists on the witness stand. The court felt that psychiatrists often testified in conclusory terms, flatly declaring that the defendant was suffering from "mental illness" or that his acts were the "product" of such an illness. Even where the psychiatrist attempted a more elaborate explanation, his testimony was often useless because the jury could not be expected to understand unexplained medical labels such as "schizophrenic," and "paranoia."

In *Taylor v. United States*,[43] the court considered the natural curiosity of the jury about the consequences of an acquittal by reason of insanity. The defendant had requested that he be allowed to inform the jury that an acquittal by insanity did not result in immediate freedom for the defendant. The court, possibly in response to popular criticism that the *Durham* rule was allowing madmen to roam the streets, promulgated the following rule: "[W]hen an accused person has pleaded insanity, counsel may and the judge should inform the jury that if he is acquitted by reason of insanity he will be presumed to be insane and may be confined in a 'hospital for the insane' as long as 'the public safety and . . . [his] welfare' require."[44] This instruction was later made mandatory in all insanity cases unless the defendant requested otherwise.[45]

IV

By 1961, the experience of the District of Columbia courts with the *Durham* rule had resulted in some disenchantment. Judge Burger, now Chief Justice of the United States Supreme Court, in a lengthy dissent in *Blocker v. United States*,[46] called for a complete re-examination of the insanity defense in the District of Columbia. The chief difficulty with the *Durham* rule, according to him, was the vagueness of the terms "mental disease" and "product." Citing *United States v. Blocker*[47] as

42. *Id.* at 9.
43. 222 F.2d 398 (D.C. Cir. 1955).
44. *Id.* at 404.
45. Lyles v. United States, 254 F.2d 725 (D.C. Cir. 1957).
46. 288 F.2d 853 (D.C. Cir. 1961).
47. 274 F.2d 572 (D.C. Cir. 1959).

an example of the anomalous results created by these terms, he noted that in that case the court had accepted a change in terminology by the psychiatric staff of St. Elizabeths Hospital which resulted in "sociopathy" being classified as a "mental disease." As a result of this change in terminology, which was done only for administrative convenience, Blocker's conviction had been overturned. Judge Burger also felt that "product" used in the sense of causation was a fallacy, and that it was impossible to prove that any mental illness "caused" a specific criminal act. Moreover, he complained that the concentration on these two terms in the psychiatric testimony allowed the psychiatrists to usurp the jury's functions by testifying on ultimate conclusions. On a more philosophical plane, Judge Burger declared that the *Durham* rule had abandoned the concept of "freedom of will," which he stated to be a fundamental tenet of the criminal law and, indeed, of an ordered, stable society. He felt that the *Durham* rule had made "determinists" of the Court of Appeals and that the court had rejected the ethical and moral obligations which form a cornerstone of the criminal law.

Further evidence of the deepening split on the Court of Appeals over the meaning of the *Durham* rule was given in *Campbell v. United States.*[48] The trial judge had given an instruction to the jury based on the "right-wrong" and "irresistible impulse" tests as well as the *Durham* test. While not denying that the earlier tests could be used as supplementary tests, the majority on the Court of Appeals found that the lower court's charge left the impression that the "right-wrong" and "irresistible impulse" tests were the sole criteria by which the jury should judge defendant's insanity. In particular, they emphasized that the "but-for" requirement of the product element of the *Durham* rule should not be presented to the jury as referring to the defendant's capacity to control his behavior. The "but-for" or "product" element of *Durham* should be used in a "deterministic sense."[49]

Judge Burger, in a vigorous dissent, denied that the "product" part of the *Durham* rule was to be taken as an espousal of determinism. He stated that a "mental disease can be thought to 'produce' a criminal act only if it affects the defendant's understanding or his power to control his acts."[50] He found that the majority's opinion would lead inexorably in a "deterministic" direction and would overthrow the

48. 307 F.2d 597 (D.C. Cir. 1962).
49. *Id.* at 602.
50. *Id.* at 604.

"moral responsibility so necessary to the criminal law."[51] As an antidote to the court's current unhealthy trend, Judge Burger recommended a return to Justice Cardozo's concept of a "common sense which assumes the freedom of the will."[52]

In concluding his dissent, Judge Burger reiterated his complaint in earlier dissents that expert psychiatric witnesses were usurping the jury's function. By testifying whether or not a defendant had a "mental disease," and whether or not defendant's action was a "product" of that disease, they were essentially deciding the ultimate issue of criminal responsibility. Moreover, this consequence of the *Durham* rule tended to narrow a psychiatrist's testimony to simple conclusions about mental disease and product. Judge Burger remarked that this was just the opposite effect from that which the court had hoped to achieve by introducing the *Durham* rule to replace the *M'Naghten* and "irresistible impulse" rules.

The majority on the District of Columbia Court of Appeals explicitly recognized the validity of some of Judge Burger's criticisms in a 1962 case, *McDonald v. United States.*[53] Judge Bazelon, writing for the majority, noted the vagueness of "mental disease" and "defect" and the unfortunate effect this vagueness had produced on the operation of the *Durham* rule:

> Our eight-year experience under *Durham* suggests a *judicial* definition, however broad and general, of what is included in the terms "disease" and "defect". In *Durham,* rather than define either term we simply sought to distinguish disease from defect. Our purpose now is to make it very clear that neither the court nor the jury is bound by ad hoc definitions or conclusions as to what experts state is a "disease or defect". What psychiatrists may consider a "mental disease or defect" for clinical purposes, where their concern is treatment, may or may not be the same as mental disease or defect for the jury's purpose in determining criminal responsibility. Consequently, for that purpose the *jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls.* Thus the jury would consider testimony concerning the development, adaptation and functioning of these processes and controls.[54]

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51. *Id.* at 611.

52. *Id.* at 609, *citing* Charles C. Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937).

53. 312 F.2d 847 (D.C. Cir. 1962).

54. *Id.* at 851 (emphasis added).

The Court of Appeals emphasized the ultimate authority of the jury on the insanity issue in *McDonald* and in a subsequent case, *Hawkins v. United States*.[55] In both cases the defendant urged a reversal of his conviction on the grounds that he should have been granted a directed verdict by the trial court. Psychiatrists had testified that both defendants were suffering from some sort of character disorder which could be considered a "mental disease." The Government offered no rebuttal evidence on defendant's sanity. The Court of Appeals refused to overturn the convictions, holding that the jury was not bound to accept the psychiatrist's determination of "mental disease." The court thus seemed to indicate, contrary to its earlier holdings, that a directed verdict in an insanity trial would be justified only in extremely rare circumstances.

The decision in *McDonald* did not completely heal the split on the Court of Appeals concerning the *Durham* rule. In *Gray v. United States*[56] Judge Bazelon and Judge Burger engaged in a spirited discussion of "free will" and its relation to the *McDonald-Durham* insanity defense. More importantly, perhaps, the decision in *McDonald* did not end the dissatisfaction of the judges with expert psychiatric testimony presented at insanity trials. Judge Bazelon, in a series of concurrences and dissents,[57] continually emphasized the inadequacy of the psychiatrists' testimony and their medical examinations of defendants. Echoing Judge Burger in earlier dissents, he attacked the continuing use of conclusory testimony dwelling on the terms "mental disease" and "product." He also expressed his disapproval of the cursory investigation into the background and childhood of the defendants, most of whom were indigents. Judge Bazelon particularly criticized the calm acceptance of "boilerplate" routine reports from government psychiatrists both at competency hearings and at trial. Again and again he stressed that the *Durham* rule was intended to allow complete investigations into a defendant's case history and background. Sketchy and hastily written psychiatric reports had done little or nothing to aid juries in their determinations.

Finally, in *Washington v. United States*[58] the court made perhaps

55. 310 F.2d 849 (D.C. Cir. 1962).

56. 319 F.2d 725 (D.C. Cir. 1963).

57. Whalem v. United States, 346 F.2d 812, 819 (D.C. Cir. 1965); Jackson v. United States, 336 F.2d 579, 581 (D.C. Cir. 1964); Simpson v. United States, 320 F.2d 803, 804 (D.C. Cir. 1963).

58. 390 F.2d 444 (D.C. Cir. 1967).

the most significant departure from the *Durham* rule. Judge Bazelon, writing for the majority, found that the performance of the psychiatrists at the instant trial had been wholly unsatisfactory. He felt that the testimony given, which included no case histories or discussion of psychiatric tests, was "conclusory" and uninformative to the jury. Reviewing the past difficulties under *Durham*, he noted that *McDonald* had attempted to provide a legal definition of "mental disease" in order to:

> clearly separate the legal and moral question of culpability from the medical-clinical concept of illness. We hoped thereby to separate the roles of the psychiatrist and jury, with the former stating medical-clinical facts and opinions and the latter making the judgments required by the legal and moral standard.[59]

After examining transcripts of the many insanity cases decided since *Durham*, however, Judge Bazelon concluded that conclusory labels had too often been substituted for the facts and analysis which underlay them. In effect, the result was often to take away the jury's function and transfer it to the psychiatrist. This, Judge Bazelon felt, was a usurpation of the society's decision to give a lay body the ultimate authority for deciding criminal responsibility.

In order to alleviate these difficulties, the court held that in the future psychiatrists were not to be allowed to testify whether defendant's action was a "product" of his mental condition. Although "mental disease" was allowed since it also had medical significance, the use of any medical or scientific labels was to be discouraged. If such terms seemed absolutely necessary, the testifying psychiatrist would be required to give a complete and practical explanation to the jury. The essence of desirable expert testimony was described as "the kind of opinion you would give to a family which brought one of its members to your clinic and asked for your diagnosis of his mental condition and a description of how his condition would be likely to influence his conduct."[60]

Beginning in 1967, the Court of Appeals decided a series of cases dealing with the relationship between alcoholism, narcotics addiction and the *McDonald-Durham* rule. In *Gaskins v. United States*,[61] the court laid down the rule that narcotics addiction alone does not justify a finding of "mental disease" within the scope of the insanity defense.

59. *Id.* at 452.

60. *Id.* at 458. The question of whether expert witnesses could testify as to a "causal relationship" between the mental disease and the act was never squarely decided. *See* Harried v. United States, 389 F.2d 281 (D.C. Cir. 1967).

61. 410 F.2d 987 (D.C. Cir. 1967).

Addiction may be considered with other evidence in deciding whether a defendant was suffering from a "mental disease" and the jury should be so instructed. A later case, *Salzman v. United States*,[62] confirmed the same rule in cases of chronic alcoholism. Although urged to reconsider the entire insanity defense and its relation to narcotics addiction in *Watson v. United States*,[63] the court declined to review *Durham* and reiterated its earlier holdings.

In *United States v. Eichberg*,[64] a recent case to reach the Court of Appeals for the District of Columbia concerning the insanity defense, the court was requested to overturn a conviction of forgery because the Government had failed to prove sanity beyond a reasonable doubt. The trial court refused to grant a motion of acquittal. In a very short per curiam opinion, the majority, citing previous cases, confirmed the lower court, holding that the question of responsibility presented a "classic" question for the jury.

Chief Judge Bazelon, in a concurring opinion, raised some questions regarding the proper function of the appellate courts in reviewing jury decisions on criminal responsibility. He noted that since *McDonald*, the court had been extremely reluctant to overturn the jury's finding of criminal responsibility, even in cases in which the Government had carried its burden of proof only by relying on the patent weakness of the evidence presented by the defendant. He doubted the validity of a rule holding the Government to a high standard of proving criminal responsibility if the appellate courts were powerless to check the jury.

Explaining this somewhat curious position, Chief Judge Bazelon pointed out the special nature of the jury's role in deciding issues of criminal responsibility in insanity cases. He noted that first, the jury had to decide a question of fact; it measured "the extent to which the defendant's mental and emotional processes and behavior controls were impaired at the time of the unlawful act."[65] On this question, the jury had to take all facts into consideration and come to a decision on those facts beyond a reasonable doubt. Judge Bazelon felt that the jury's second function was to "evaluate that impairment (*i.e.* the defendant's) in light of community standards of blameworthiness, to determine whether the defendant's impairment makes it unjust to hold

62. 405 F.2d 358 (D.C. Cir. 1968).
63. 439 F.2d 442 (D.C. Cir. 1970).
64. 439 F.2d 620 (D.C. Cir. 1971).
65. *Id.* at 624.

him responsible."[66] It was disturbing to Judge Bazelon, however, that the court regularly placed this burden of deciding the second question, *i.e.* "blameworthiness," on the jury without giving it clear instructions pointing out this special function. He recommended telling the jurors that they were "measuring mental disability in terms of community concepts of blameworthiness."[67] The minority report of the ALI-Model Penal Code Commission also adopted this approach:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect his capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law is *so substantially impaired that he cannot justly be held responsible.*[68]

Although Judge Bazelon realized that many commentators disliked presenting questions of justice to the jury, he considered it wrong to disguise this jury function in the form of a pseudo-factual or medical test.

Chief Judge Bazelon concluded his concurrence in *Eichberg* by summarizing the difficulties that had been encountered with the *McDonald-Durham* rule. Psychiatric testimony had too often been conclusory, and had centered around whether the defendant was suffering from "mental disease" or whether his act was the "product" of the disease. Hearkening back to an earlier comment in *Washington* Chief Judge Bazelon noted that it might be more sensible to "make the ultimate test whether or not it is just to blame the defendant for his act. If the question was simply whether it is 'just' to blame the defendant, then mental illness, productivity, ability to control oneself, etc., might be factors which the jury could consider in reaching its conclusion on the justness of punishment."[69] Judge Bazelon felt, however, that since the court would shortly be reconsidering the test of criminal responsibility in *United States v. Brawner*,[70] he was content to join the majority in confirming the lower court opinion in the present case.

V

The facts of *Brawner* were largely uncontested and can be very sim-

66. *Id.* at 625.
67. *Id.*
68. *Id.* (emphasis added).
69. Washington v. United States, 390 F.2d 444, 452 n.23 (D.C. Cir. 1967), *cited in* United States v. Eichberg, 439 F.2d 620, 627 n.33 (D.C. Cir. 1971).
70. 471 F.2d 969 (D.C. Cir. 1972).

ply stated. Archie Brawner had spent the morning and afternoon of September 8, 1967, drinking wine. Together with his uncle, he went that evening to a party at the home of three acquaintances. About 10:30 a fight broke out, and Brawner was injured. After leaving the party, Brawner secured a gun and returned to the site of the party. He fired five shots through the closed metal door to the apartment; two of the shots struck Billy Ford, killing him. Brawner was arrested shortly thereafter.

Brawner was convicted of murder in the second degree. At the trial, four psychiatrists and psychologists on the staff of St. Elizabeths Hospital testified as expert witnesses, two testifying for the prosecution and two for the defense. All four experts testified that defendant was suffering from a mental disease, variously described as an "epileptic personality disorder," "psychologic brain syndrome associated with a convulsive disorder," "personality disorder associated with epilepsy," or "explosive personality."[71] The experts disagreed, however, on the part which defendant's mental disease played in the killing. The two witnesses for the defense testified that the defendant's act was a product of his mental disease; the two government witnesses, on the other hand, testified that it was not.

On appeal, counsel for the defense argued two grounds for overturning the verdict: 1) the trial court should not have permitted a prosecution expert witness to testify whether there was a "causal relationship" between the defendant's mental disease and the act of killing; and 2) the prosecutor in his summation went beyond permissible limits in attempting to discredit certain psychological projective tests administered to the defendant at St. Elizabeths. After the case was argued to a division of the Court of Appeals, the court sua sponte ordered rehearing en banc. Briefs amici curiae were solicited by the court on the question of the appropriate standard for the insanity defense in the District of Columbia. Briefs were received from Mr. William H. Dempsey, Jr. (appointed as amicus curiae by the court); The American Civil Liberties Union Fund of the National Capital Area; the National Legal Aid and Defender Association; the National District Attorneys Association; the Georgetown Legal Intern Project; the American Psychiatric Association; the American Psychological Association; the Bar Association of the District of Columbia; and Mr. David L. Chambers, III.

71. *Id.* at 975.

On June 23, 1972, the Court of Appeals handed down its decision in the *Brawner* case. The court announced that it had decided to abandon the insanity defense formulated in *Durham* eighteen years before. Replacing *Durham* in all future cases would be the formulation devised by the American Law Institute (ALI) and already adopted by the majority of the federal circuits: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law."[72] The court retained, however, the definition of "mental disease or defect" adopted in *McDonald*: "A mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially affects behavior controls."[73]

In addition to the reformulation of the insanity defense for the District of Columbia, the Court of Appeals also discussed several corollary issues. The court mentioned, but did not decide, the constitutionality of the 1970 amendment to the District of Columbia Code, which apparently shifted the burden of proof on the insanity issue to the defendant.[74] The court affirmed its previous ruling in *Lyles v. United States*[75] that the jury should be instructed on the effect of a verdict of not guilty by reason of insanity.[76] Most importantly, perhaps, the court reversed its earlier position and stated that, in the future, expert testimony as to a defendant's abnormal mental condition could be considered in deciding whether a defendant had the specific mental state required for a particular crime or degree of crime.

In disposing of the case at hand, the Court of Appeals rejected both grounds of error proffered by the defendant's counsel. The court found that testimony on the "causal relationship" between defendant's mental state and his act was not so prejudicial as to amount to reversible error. Again, although the court reproved the prosecution for its "overzealous" attempt to discredit projective psychological tests, it held that the defendant had not been unduly prejudiced. However, the court remanded the case to the district court to determine whether a new

72. *Id.* at 973.
73. *Id.* at 983.
74. D.C. CODE ANN. § 24-301(j) (1970).
75. 254 F.2d 725 (D.C. Cir. 1957).
76. *See* text accompanying note 45 *supra.*

trial would be appropriate in light of the change in the formulation of the insanity defense.

In a lengthy concurring opinion, Chief Judge Bazelon accepted the replacement of the *Durham* rule by the ALI formulation. To him, however, the principal issue was whether the adoption of the ALI formulation would be responsive to the difficulties encountered under *Durham*. The first difficulty, a definition of "mental disease or defect" which would lessen the dominance of expert testimony, Judge Bazelon felt had not been overcome, since the majority retained the existing definition. A second difficulty, the problem of "productivity," had been ameliorated by discarding this term from the insanity defense formulation. Judge Bazelon noted, however, that the ALI formulation also contains a strong, if not so apparent, element of causality. Finally, the practical difficulties surrounding indigent defendants who must depend on charity for legal and psychiatric assistance had not been touched upon by the new formulation of the insanity defense. Judge Bazelon would have preferred an insanity formulation along the lines of the Royal Commission Report: a defendant is not responsible "if at the time of his unlawful conduct his mental or emotional processes or behavior controls were impaired to such an extent that he cannot justly be held responsible for his act."[77] However, Judge Bazelon's concern was not centered so much on the exact formula used to express the insanity defense as on the immediate and practical problems presented by criminal administration of the insanity defense. He feared that it might be said of *Brawner*, as it was of *Durham*, that "while the generals are designing an inspiring new insignia for the standard, the battle is being lost in the trenches."[78]

77. United States v. Brawner, 471 F.2d 969, 1032 (D.C. Cir. 1972).
78. *Id.* at 1012.